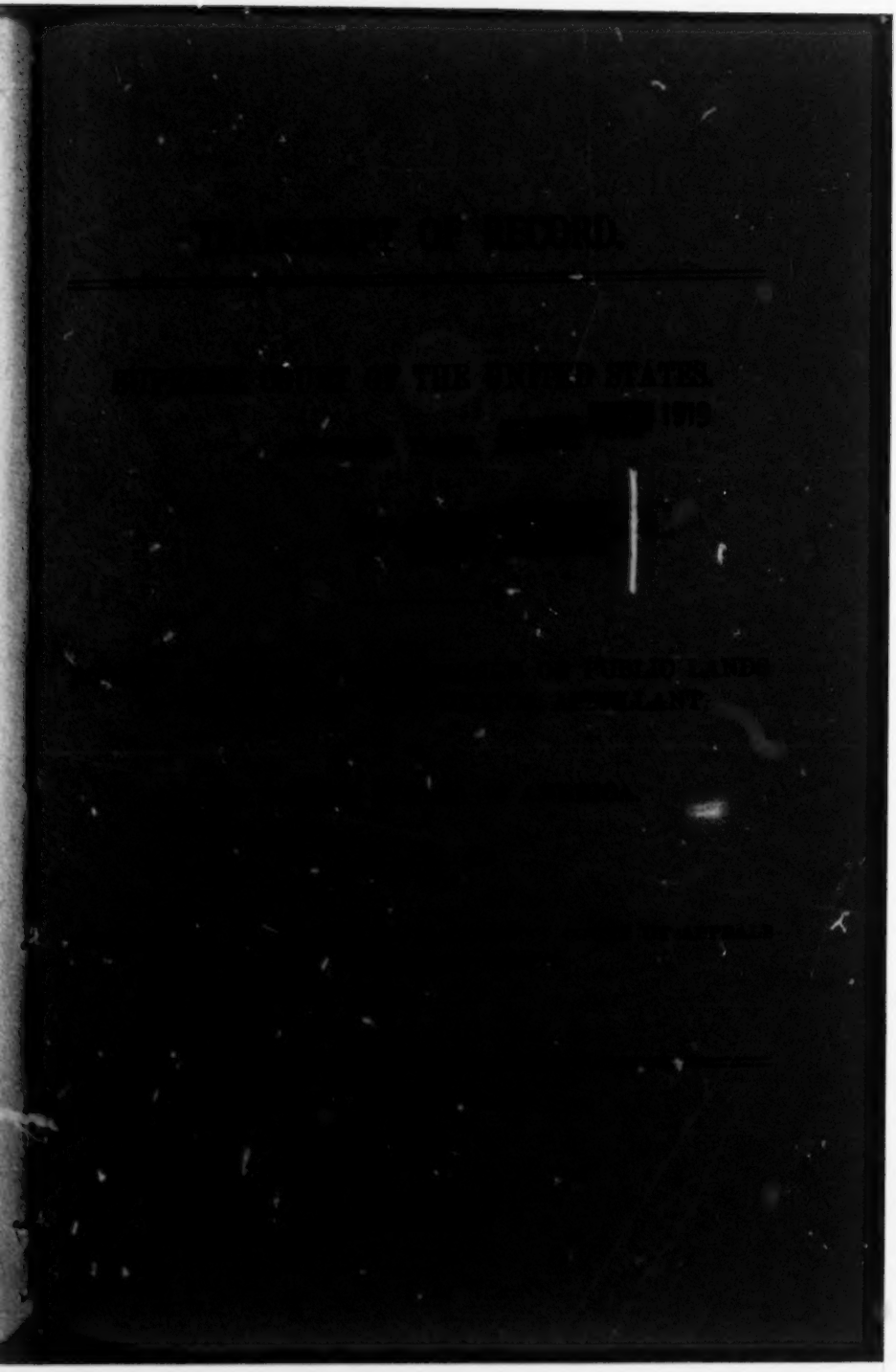

(26,401)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 934.

ROBERT P. ERVIEN, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 1, 1918.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1917, of said Court, Before the Honorable William C. Hook, the Honorable Walter I. Smith and the Honorable John E. Carland, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fourteenth day of March, A. D. 1916, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of New Mexico, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America was Appellant, and Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, was Appellee, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

1 Be it remembered, that heretofore, to-wit, on the 7th day of August, 1915, there was filed in the office of the Clerk of the United States District Court for the District of New Mexico, a Bill of Complaint, which said Bill of Complaint, appears in words and figures as follows, to-wit:

In the District Court of the United States for the District of New Mexico.

No. 394. Equity.

UNITED STATES OF AMERICA, Plaintiff,

v.

ROBERT P. ERVIEN, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, Defendant.

Bill of Complaint.

To the Honorable William H. Pope, Judge of the District Court of the United States for the District of New Mexico:

Plaintiff, United States of America, by Thomas W. Gregory, Attorney General of the United States, and Summers Burkhart, United

States Attorney for the District of New Mexico, brings this its Bill of Complaint against Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, and thereupon complains and says:

I.

That said defendant, Robert P. Ervien, is a citizen of New Mexico and resides at Santa Fe in said State, and is Commissioner of Public Lands of the State of New Mexico.

II.

That plaintiff brings this Bill of Complaint under authority of Section 10 of an Act of the Congress of the United States, entitled: "An Act to Enable the People of New Mexico to Form a Constitution and State Government and be Admitted into the Union on an Equal Footing with the Original States * * *" approved June 20, 1910, 36 Statutes at Large 563, and to enforce the provisions of said Act relative to the application and disposition of the lands granted and confirmed to the State of New Mexico by the said Act and the products thereof and the funds derived therefrom.

2

III.

That the State of New Mexico was admitted into the Union, and the Constitution under which it was so admitted was formed, submitted to and ratified by the people of New Mexico, under and in conformity with the provisions of the said Act of Congress of June 20, 1910, hereinafter referred to as the Enabling Act, and the joint Resolution of the Senate and House of Representatives of the United States, entitled: "Joint Resolution to Admit the Territories of New Mexico and Arizona as States into the Union Upon an Equal Footing with the Original States," adopted August 21, 1911.

IV.

That by the said Enabling Act and under the conditions prescribed thereby and subject to the provisions thereof, certain grants of public lands of the United States were made to the State of New Mexico, and certain other grants of public lands of the United States, heretofore made to the Territory of New Mexico by other Acts of the Congress of the United States, were confirmed to the State of New Mexico, for the following purposes, and none other, to-wit: for the support of common schools; for the purpose of erecting public buildings at the Capital of the State of New Mexico when said territory shall become a state and be admitted into the Union, when said Capitol shall be permanently located by the people of New Mexico; for legislative, executive and judicial purposes; for University purposes; for the establishment of permanent water reservoirs for irrigating purposes; for the improvement of the Rio Grande in New Mexico and the increasing of the surface flow of the water in the bed of said river; for the establishment and maintenance of an asylum

for the insane; for the establishment and maintenance of a School of Mines; for the establishment and maintenance of an asylum for the deaf and dumb; for the establishment and maintenance of a reform school; for the establishment and maintenance of normal schools; for the establishment and maintenance of an institution for the blind; for a miners' hospital for disabled miners; for the establishment and maintenance of a military institute; for the enlargement and maintenance of the territorial penitentiary; for charitable, penal and reformatory institutions; for legislative, executive and judicial public buildings, heretofore erected in the Territory of New Mexico, or to be erected in the proposed State of New Mexico, and for the payment of the bonds heretofore or hereafter issued therefor; for agricultural and mechanical colleges; for the payment of the bonds and accrued interest thereon issued by Grant and
3 Santa Fe Counties, New Mexico, which said bonds were validated, approved and confirmed by Act of Congress of January 16, 1897, 29 Statutes at Large 487; as will more fully appear by the said Enabling Act and by the Act of Congress entitled, "An Act to Make Certain Grants of Land to the Territory of New Mexico and for Other Purposes," approved June 21, 1898, 30 Statutes at Large 484.

V.

That by Section 10 of the said Enabling Act, it is amongst other things provided:

"That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory (of New Mexico) are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided, and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of the said lands shall be subject to the same trusts as the lands producing the same.

The disposition of any of said lands or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

And by Section 10, it is further provided:

"It shall be the duty of the Attorney-General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

VI.

That by Section 2 of the said Enabling Act, it was provided that the Constitutional Convention, authorized by the said Act, should

provide by an ordinance irrevocable without the consent of t
United States and the people of said State, amongst other thin
that the State and its people consent to all and singular t
4 provisions of said Act, concerning the lands thereby grant
or confirmed to the state, the terms and conditions up
which said grants and confirmations were made, and the means a
manner of enforcing such terms and conditions all in every resp
and particular, as in said Act provided.

VII.

That in and by Article 21 of the Constitution of the State of Ne
Mexico and by Sections 9 and 10 thereof, it was provided, in co
pliance with the requirements of the said Enabling Act, that t
said State and its people consent to all and singular the provisio
of the said Act of Congress concerning the lands by said Act grant
or confirmed to the State, the terms and conditions upon whi
said grants and confirmations were made, and the means and ma
ner of enforcing such terms and conditions, all in every respect a
particular as in said Act provided. And that the said ordinance
irrevocable without the consent of the United States and the peop
of the State, and that no change or abrogation of said ordinan
in whole or in part, shall be made by any constitutional amendmen
without the consent of Congress. That the said provisions in sa
Article 21 of said Constitution are in full force and effect.

VIII.

That the Legislature of the State of New Mexico, on March 8t
1915, passed, over the veto of the Governor of New Mexico, an A
entitled: "An Act Concerning the Publicity and Promotion of Pu
lic Resources and Welfare," a copy of which is attached to and ma
a part of this Bill of Complaint and marked "Exhibit A" for iden
fication, by Section One of which it is provided:

"Sec. 1. It shall be unlawful for the Commissioner of Publ
Lands to expend for making known the resources and advantag
of this state generally and particularly to homeseekers and investo
more than three cents on the dollar of the annual income of his offi
from sales and leases of lands, but, up to such limit of money ann
ally, he may give or cause to be given publicity to such resourc
and advantages, and do or cause to be done all incidental work, i
his judgment advisable to be done."

IX.

That the office of the Commissioner of Public Lands annuall
receives and will continue to receive a large income from sales an
leases of the lands granted and confirmed to the State of Ne
5 Mexico by the said Enabling Act, the income from sa
sources during the year ended December 31st, 1914 havin
been approximately $741,000.00.

X.

The paintiff avers that the said act of the Legislature of the State of New Mexico is null and void and in contravention of the Constitution of the State in that it seeks to authorize the disposal of a portion of the funds derived from the sale and leasing of the lands granted and confirmed to the state for purposes and objects other than those for which the lands were granted and confirmed, and the said act therefore confers no legal authority for making the expenditure which it assumes to authorize; notwithstanding which the defendant threatens that he will expend three cents on the dollar of the annual income of his office derived from sales and leases of lands to give publicity to the resources and advantages of the state generally, in conformity with the provisions of the said act of the legislature. and plaintiff believes and therefore avers the fact to be that, unless the defendant is restrained by order of this court from so doing, he will so expend said funds.

Plaintiff therefore prays that a temporary injunction may issue against the said defendant, restraining and enjoining him, as Commissioner of Public Lands of the State of New Mexico, his agents, clerks and employees and anyone assuming to act under his authority, from expending any of the funds derived from the sale and lease of the lands granted and confirmed by the said Enabling Act to the State of New Mexico for the purposes set forth in the said Act of the Legislature of the State of New Mexico, entitled: "An Act Concerning the Publicity and Promotion of Public Resources and Welfare," or for any other purpose than that for which the said lands and the funds derived therefrom were granted and confirmed to said state; that upon final hearing, the said Act of the Legislature of the State of New Mexico be declared to be unconstitutional and void, and a breach of the trust upon which the said lands were granted and confirmed to the said state, and that the said injunction may be made perpetual, and for such other and further relief as equity may require and as to the Court may seem meet.

UNITED STATES OF AMERICA,
By T. W. GREGORY,
Attorney General of the United States.
S. BURKHART,
United States Attorney for the District of New Mexico.

6 STATE OF NEW MEXICO,
County of Bernalillo, ss:

Summers Burkhart, of lawful age, being duly sworn, on his oath states that he is United States Attorney for the District of New Mexico; That he has read over the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated therein to be on information and belief, and as to those matters, he believes them to be true.

S. BURKHART.

Subscribed and sworn to before me this 6th day of August, 19
SADIE L. OLESON,
[SEAL.] *Notary Public, Bernalillo County, New Mexic*

My commission expires May 15, 1917.

(Copy.)

EXHIBIT A.

House Bill No. 357.

Introduced by Mr. Renehan of Santa Fe.

An Act Concerning the Publicity and Promotion of Public
sources and Welfare.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. It shall be unlawful for the Commissioner of Pu
Lands to expend for making known the resources and advant
of this state generally and particularly to homeseekers and invest
more than three cents on the dollar of the annual income of
office from sales and leases of lands, but, up to such limit of mo
annually, he may give or cause to be given publicity to such resou
and advantages, and do or cause to be done all incidental work
his judgment advisable to be done.

Sec. 2. It is necessary for the preservation of the public peace
safety of the inhabitants of this State that this Act shall bec
effective without delay, and therefore, it shall be in full force f
and after its passage, by the required two-thirds majority, or fai
such majority, at the time otherwise provided by the Constitutio

Signed in open session this the 8th day of March, 1915.
SECUNDINO ROMERO,
Speaker of the House of Representative

Attest:
BLAS SANCHEZ,
Chief Clerk.

7 E. C. DE BACA,
President of the Senat

Attest:
ISIDORE ARMIJO,
Chief Clerk.

Approved by me this — day of March, 1915.
GOVERNOR OF NEW MEXICO

Filed in Office of Secretary of State of New Mexico, Mar.
1915, 4:10 P. M. Antonio Lucero, Secretary.

Endorsed: (Exhibit A.) Filed August 7, 1915. Harry F.
Clerk.

(*Order to Show Cause.*)

Entered August 9, 1915.

Upon reading the bill of complaint heretofore filed herein, and after hearing Summers Burkhart, United States Attorney, it is ordered by the Court, that said defendant be and he hereby is ordered to show cause, if any he have, before this Court on Monday, the 23rd day of August, 1915, at the hour of ten o'clock A. M., why the injunction prayed for in said bill of complaint shall not be granted.

It is further ordered that said defendant be served with a duly certified copy of this order, together with a copy of the bill of complaint filed herein, at least ten days before said return day fixed herein.

This the 9th day of August, 1915.

WILLIAM H. POPE,
Judge.

Endorsed: Filed August 9, 1915. Harry F. Lee, Clerk. (Marshal's Return on Order to Show Cause. Filed Aug. 12, 1915.)

UNITED STATES OF AMERICA,
District of New Mexico, ss:

I, A. H. Hudspeth, United States Marshal for the District of New Mexico, hereby certify that the within Order came to my hand on the 9th day of August, A. D. 1915, and was duly executed by delivering to Robert P. Ervien, personally, a true copy of the within named Order, at Santa Fe, in the County of Santa Fe, State of New Mexico, on the 9th day of August, 1915.

A. H. HUDSPETH,
U. S. Marshal,
By JAS. J. GOUTCHEY,
Office Deputy.

Service, $4.00.

Endorsed: Filed August 12, 1915. Harry F. Lee, Clerk.

(*Answer.*)

Filed August 14, 1915.

Now comes the said defendant in response to the order of said court to show cause why the injunction prayed for in the bill of
8 complaint herein should not be granted, and as such showing and for an answer to the said bill of complaint, he shows to the court the following:

1. Defendant admits the truth of all of the allegations contained in the paragraphs of said bill of complaint from one to eight, both inclusive, but at the same time objects to those allegations as in no

way being sufficient to constitute or to tend to constitute any valid cause of action in equity against him.

2. As to the allegations in the ninth paragraph of said bill of complaint, the defendant admits that the office of the Commissioner of Public Lands annually receives, and will continue to receive, a large income from sales and leases of the lands granted and confirmed to the State of New Mexico by the act of Congress commonly called the "Enabling Act," but he denies that the income from said sources during the year ended December 31, 1914, was approximately $741,000, and states the fact to be that the income of his office from said sources, that is to say, from sales and leases of lands, for the state fiscal year which ended November 30, 1914, was about $383,061.78, and that the income for the calendar year of 1914 which in said bill of complaint is alleged to have been $741,000, must be about the same as the amount above stated for the state fiscal year, it being difficult to compile the necessary figures so as to show what the income from said sources actually was during the calendar year. Defendant further shows that the total amount transferred to the State Treasurer during said state fiscal year was $413,793.24 and that of this amount the sum of $30,731.46 was not a part of the income of said office from sales and leases of lands, but was made up of the following items:

Money from escheated property	$1,372.50
Money received from the Secretary of the Treasury as the share of the state of proceeds of national forests	16,601.99
Five per cent of proceeds of sales of public lands	11,529.56
Money received for furnishing plats, copies, etc	44.65
Fees returned paid upon selections afterwards rejected	1,159.16
Money received from forfeitures	23.60

Defendant further answering said paragraph nine of the bill of complaint objects that it is irrelevant, impertinent and in no way tends to establish any cause of action in equity against him.

3. As to the tenth paragraph of the bill of complaint, defendant objects to the same as being merely an incorrect statement of
9 law and containing no statement of fact, but he denies that the said act of the legislature of the State of New Mexico is null or void or in contravention of the Constitution of the State, and denies that it seeks to authorize the disposal of a portion of the funds derived from the sale and leasing of the lands granted and confirmed to the state, for purposes other than those for which the lands were granted and confirmed, and he denies that the said act confers no legal authority for making the expenditure which it authorizes; and he denies that he threatens or has threatened that he will expend three cents on the dollar of the annual income of his office derived from sales and leases of lands to give publicity to the resources and advantages of the state generally, but he states the fact to be that when it shall seem expedient and desirable so to do, he may expend money for the purpose of giving publicity to the resources and advantages of the state generally and particularly to home-seekers and investors, but not necessarily to the full limit of three cents on the

dollar of the annual income of his office derived from sales and leases of lands, but so much thereof as may seem proper and desirable.

4. Defendant further objects to the sufficiency of the facts stated in said bill of complaint to constitute a valid cause of action in equity against him, that taken as a whole it is no more than an attempt to interfere with the due administration of a trust estate by the trustee, the State of New Mexico, which requires the payment of necessary and proper expenses out of the income or proceeds of the trust property, the grantor of the trust, the government of the United States, having made no other provision for the payment of such necessary and proper costs and expenses; and defendant avers that the expenditure of a small portion of such income and proceeds for the purpose of advertising the resources of the state and the value of its lands, with the hope of thereby increasing the demand for the purchase and leasing of such lands and the enhancing of the prospective prices to be derived therefrom, is a proper and necessary expense of the administration of said trust estate.

Wherefore, the said defendant having fully answered said bill of complaint, prays that the application of the plaintiff for an injunction as prayed in the bill of complaint be denied and that the said bill of complaint be dismissed and that he go hence without day with his costs wrongfully sustained.

ROBERT P. ERVIEN,
Defendant,
By FRANK W. CLANCY,
Attorney General for the State of New Mexico.

10 STATE OF NEW MEXICO,
County of Santa Fe, ss:

Before me the undersigned, a notary public in and for said state and county, on this 14th day of August, 1915, personally appeared Robert P. Ervien, who being duly sworn, on his oath says that he has read the foregoing answer and knows the contents thereof and that the same is true.

ROBERT P. ERVIEN.

Subscribed and sworn to before me this 14th day of August, 1915.

[SEAL.] ESTHER M. BARTON,
Notary Public.

My commission expires September 18, 1919.

Endorsed: Filed August 14, 1915. Harry F. Lee, Clerk.

(*Entering Cause Heard on Order to Show Cause, Aug.* 23, 1915.)

Now comes the United States of America, by her District Attorney, Summers Burkhart, Esq., and comes the defendant, Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, by the Attorney General of the State of New Mexico, Frank W. Clancy, Esq., and this cause coming on for hearing on order of court entered

herein August 9th, 1915, directing defendant to appear and show cause, if any he have, why the injunction prayed for in plaintiff's complaint should not be granted, and counsel having been heard, the matter is taken by the court as submitted.

(*Filing Opinion and Order of Court and Entering Order, September 4, 1915.*)

Chapter 60 of the Session Laws of New Mexico for 1915 is entitled "An Act Concerning the Publicity and Promotion of Public Resources and Welfare." It provides that the Commissioner of Public Lands may expend three per cent of the annual income of his office from sales and leases of lands for the purpose of "making known the resources and advantages of this state generally, and particularly to homeseekers and investors." The question here involved is whether the use by the Commissioner of funds derived from the sale and lease of land as allowed by this Chapter is a breach of the trust reposed in the State of New Mexico by the Enabling Act and by the State Constitution accepting the terms of that act. These latter gave to the State of New Mexico large bodies of land, to be selected by its officers, to be thereafter advertised for not less than a period, and in the newspapers, designated by the Enabling Act, and thereupon leased or sold, any sale to be for not less than the amounts named in
11 the Enabling Act, dependent upon the location and character of the land. The proceeds when derived are, by the terms of the Act, to be devoted to certain specific objects, and no other. Does this justify the use of a percentage of these funds for the purposes named in Chapter 60 above referred to?

The rule is well established that in the administration of a trust the trustee has a right to expend such sums as are necessary for the expenses of a proper administration of the trust. This is true whether the terms of the trust explicitly allow this to be done or not. It is a necessary concomitant of the fact that the trust is reposed. This general principle is not disputed by the government, but it is contended that an expenditure of the three per cent above named would not be a proper or necessary expense in the discharge of the trust. I am unable to concur in this view. By the Enabling Act, the State has confided to it bodies of land aggregating millions of acres. This land is not granted by the government to the State to be kept, but to be disposed of, in order that endowments and incomes may be provided for the various institutions which are the beneficiaries of the law. This disposition of the land is, of course, to be upon the best terms possible; that is to say, at the highest prices which can be procured. These latter can be secured only by wide publicity. Under such circumstances what would an individual owning such an estate and who wished to sell or lease it be allowed to do? He would, in the exercise of a sound business judgment, be allowed at the very outset to make its resources known. Newspaper articles would be published; pamphlets and other literature for distribution would be prepared, and the dissemination of these would be entered upon. If this would be the course properly pursued by an

ndividual controlling such an estate, it would seem that the same rivilege should be accorded the state controlling and disposing of nd for its institutions. The fact that by Chapter 60 the publicity not confined to the specific lands being at the moment advertised r lease or sale does not impress me as material. An advertisement f the entire state and of its resources benefits every portion thereof. s is well known, these lands selected under the Enabling Act, re located in every portion of New Mexico. Therefore, literature escriptive of the state tends to aid in each instance towards the le of some portion of these holdings. It is not disputed that an nquiry as to a particular section of land may be answered by a type-ritten letter and the cost of the office force which prepares, writes ut, and mails the letter may be charged to the administration of his great estate. If this may be done through the typewriter, why may not it be done through the printing press? Why may 2 not the letter be answered by a pamphlet instead of by a typewritten letter? And why may not this pamphlet de-ribe either the particular locality, the particular county, or the tate at large? The resources of each of these sub-divisions enters nto the value of any tract under consideration. If a private owner ould do business in this way, and if in so doing business we would ay that he is acting wisely, why may not the state pursue the same ourse? I am of opinion that it may.

Attention is called by the government to the fact that in the Enabling Act there is a provision that no sale or lease shall be made xcept at public auction, after advertisement of the land in a news-aper at the capital and in another newspaper near the land. It s argued that this shows the degree of advertisement which Con-ress considered necessary in the disposition of these lands, and that he use of more than the amount necessary for such advertisement s an abuse of the trust. I am of opinion, however, that the ad-ertisement provided by the Enabling Act was simply in order to ecure a fair sale at public outcry. This requirement goes more to he matter of notice of the sale than of publicity as to the character nd resources of the land. A reasonable effort to secure a larger rice by the presentation of these resources is in my judgment not recluded by the Enabling Act. It should be added that no ques-ion is here raised that under the guise of a proper publicity the unds mentioned in Chapter 60 are to be used for other purposes. Such a diversion would, of course, stand upon an entirely different asis. Nor is there any question here that the percentage allowed y Chapter 60 for publicity is excessive. The amount according to he pleadings which will be derived from this three per cent can-ot exceed ten or fifteen thousand dollars annually. This is not n its face excessive in furtherance of the disposition of an estate worth millions.

The motion for a temporary injunction will be denied, and, n the absence of anything further to be presented by the govern-ment, the bill of complaint will stand for dismissal.

Wherefore:

Order.

This cause having been heretofore submitted to this Court upon the motion of the United States of America for a temporary injunction herein;

It is now ordered by the Court that said motion be, and the same is hereby, denied: To which ruling of the Court the United States of America duly excepted.

Santa Fe, New Mexico, this September 4, 1915.

WILLIAM H. POPE,
U. S. District Judge.

Endorsed: Filed September 4, 1915. Harry F. Lee, Clerk.

13 (*Stipulation Submitting Cause on Bill of Complaint, and Answer of Defendant.*)

Filed January 8, 1916.

This cause having heretofore come on for hearing before the Court on the order to show cause issued herein, and the defendant having filed his answer to the bill of complaint of the plaintiff, it is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that this cause be, and it hereby is, submitted upon the bill of complaint of the plaintiff and the answer of the defendant.

CHARLES R. EASLEY,
Ass't U. S. Att'y, for Plaintiff.
FRANK W. CLANCY,
Attorney General of New Mexico, for the Defendant.

Endorsed: Filed January 8, 1916. Harry F. Lee, Clerk.

(*Final Decree Filed and Entered January* 8, 1916.)

This cause, this day, having been submitted by stipulation of all parties, for final determination of the court, on the bill of complaint of the plaintiff and the answer of defendant, and the court now being fully advised,

It is ordered by the court that the issues herein, be, and the same hereby are found in favor of defendant, and that plaintiff take nothing by its bill herein and that the defendant go hence without day and that plaintiff's bill be, and the same hereby is dismissed. To which action of the court, counsel for plaintiff then and there duly excepted.

Dated, Santa Fe, New Mexico, January 8th, 1916.

WILLIAM H. POPE,
U. S. District Judge.

Endorsed: Filed January 8, 1916. Harry F. Lee, Clerk.

(*Petition for Appeal.*)

Filed January 12, 1916.

the Honorable William H. Pope, Judge of the United States District Court for the District of New Mexico:

The above named plaintiff, United States of America, feeling itself aggrieved by the decree made and entered in this cause on the day of January, A. D. 1916, does hereby appeal from said decree the Circuit Court of Appeals for the Eighth Circuit, for the sons specified in the assignment of errors, which is filed herewith, d it prays that its appeal be allowed and that citation issue as vided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

UNITED STATES OF AMERICA,
By S. BURKHART,
United States Attorney for the District of New Mexico.

Endorsed: Filed January 12, 1916. Harry F. Lee, Clerk.

(*Assignment of Errors.*)

Filed January 12, 1916.

Now comes the United States of America, by Summers Burkhart, nited States Attorney for the District of New Mexico, and says at in the record and proceedings in the above-entitled cause, there manifest error in this, to-wit:

I.

The court erred in holding valid the Act of the Legislature of e State of New Mexico of March 8, 1915, entitled: "An Act Conrning the Publicity and Promotion of Public Resources and Welre" (New Mexico Statutes, Annotated, 1915, p. 78) and that the me is not null and void because in contravention of the Constituon of the State of New Mexico and of the Act of Congress of the nited States, entitled: "An Act to Enable the People of New Mexo to Form a Constitution and State Government and be Admitted to the Union on an Equal Footing with the Original States," proved June 20th, 1910, (36 Statutes at Large, 563) hereinafter lled the Enabling Act, in that the said Act of said Legislature eks to authorize, contrary to the provisions of said Constitution nd of said Enabling Act, the disposal of a portion of the funds erived from the sale and leasing of the lands granted and conrmed to the State of New Mexico by said Enabling Act for purposes and objects other than those for which the said lands were ranted and confirmed to said state by said Enabling Act.

II.

The Court erred in holding that the said Act of the said L
lature of the State of New Mexico does not attempt to author
breach of the trust upon which the lands so granted and confi
to the said State of New Mexico by the said Enabling Act we
granted and confirmed.

III.

The Court erred in refusing to enjoin the said defendan
Commissioner of Public Lands of the State of New Mexico,
expending any funds derived from the sale and leasing of the
granted and confirmed to the State of New Mexico by the said
abling Act, for the purpose and object set forth in the said A
the said Legislature.

15 IV.

The Court erred in finding the issues herein against plaintiff
in favor of defendant and in dismissing the said bill of complai

S. BURKHART,
United States Attorney for the District of New Mexi

Endorsed: Filed January 12, 1916. Harry F. Lee, Clerk.

(*Order Allowing Appeal.*)

Filed and Entered January 12, 1916.

Comes now the plaintiff, the United States of America, by Cha
Easley, Assistant United States Attorney, on this 12th day of
uary, A. D. 1916, and files and presents to the Court its petition
ing for an allowance of an appeal and praying further that a
authenticated transcript of the record herein may be sent t
United States Circuit Court of Appeals for the Eighth Judicial
cuit, and that such other and further proceedings may be had i
premises as may be just and proper; and, upon consideration o
premises, the Court does hereby allow such appeal.

At Santa Fe, New Mexico.

WILLIAM H. POPE,
U. S. District Jud

Endorsed: Filed January 12, 1916. Harry F. Lee, Clerk.

(*Citation on Appeal and Acceptance of Service Thereon.*)

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America, to Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by the District Court of the United States for the District of New Mexico, sitting at Santa Fe, wherein the United States of America is appellant and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Pope, Judge of the Dis-
16 trict Court of the United States for the district of New Mexico, at Santa Fe, in said district, this 12th day of January, A. D. 1916.

WILLIAM H. POPE,
United States District Judge, District of New Mexico.

Service of the within citation is hereby accepted for and on behalf of Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, appellee, on the 12th day of January, A. D. 1916, at Santa Fe, N. M.

FRANK W. CLANCY,
Attorney General and Solicitor for Appellee.

(*Præcipe and Acceptance of Service Thereon.*)

Filed January 15, 1916.

The appellant in the above entitled cause elects to file in the Appellate Court transcript of the record as authorized by the Act of February 13th, 1911, and hereby directs the Clerk to prepare a typewritten transcript of so much of the record as hereinafter designated, as provided by the rules of the Court, to be used by plaintiff in having transcript printed, said typewritten transcript to contain the following:

1. Bill of Complaint.
2. Order to Show Cause.
3. Return showing Service on Order to Show Cause.
4. Answer of the Defendant.
5. Heard on Order to Show Cause and taken as submitted.

6. Opinion and Order of Court of Sept. 4, 1915.
7. Stipulation submitting cause on Bill of Complaint and Answer.
8. Final Decree of Dismissal.
9. Motion for Appeal.
10. Assignments of Error.
11. Order Allowing Appeal.
12. Citation on Appeal and Acceptance of Service thereon.
13. Præcipe and Acceptance of Service thereon.
14. Clerk's Certificate.

CHAS. R. EASLEY,
Ass't United States Attorney.

To Harry F. Lee, Clerk, Santa Fe, New Mexico, Jan. 12, 1916:

Service of a copy of the above and foregoing præcipe is hereby accepted on this 15th day of January, 1916.

FRANK W. CLANCY,
Attorney General of New Mexico and Solicitor for Appellee.

Endorsed: Filed January 15, 1916. Harry F. Lee, Clerk.

17 UNITED STATES OF AMERICA,
United States District Court,
District of New Mexico, ss:

I, Harry F. Lee, Clerk of the United States District Court for the District of New Mexico, do hereby certify that the above and foregoing constitutes a full, true and complete transcript of so much of the record of the cause therein entitled the United States of America v. Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, No. 394, Equity, as requested by præcipe of plaintiff filed therein, and as the same now remains of record and on file in my office.

I do further certify that the original citation with the acceptance of service endorsed thereon, is also hereto attached and herewith returned as a part of the transcript of this record.

Witness my hand and the seal of the United States District Court of New Mexico, this 18th day of January, A. D. 1916.

[SEAL.] HARRY F. LEE,
Clerk.

18 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Order of Submission.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1917.

TUESDAY, MAY 8, 1917.

No. 4673.

UNITED STATES OF AMERICA, Appellant,

vs.

ROBERT P. ERVIEN, Commissioner of Public Lands, Etc.

Appeal from the District Court of the United States for the District of New Mexico.

This cause having been called for hearing in its regular order, the same is, pursuant to the stipulation of the parties, submitted to the Court without oral argument, on the transcript of the record from said District Court and the briefs of counsel filed herein.

19 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1917.

No. 4673.

UNITED STATES OF AMERICA, Appellant,

vs.

ROBERT P. ERVIEN, Commissioner of Public Lands of the State of New Mexico, Appellee.

Appeal from the District Court of the United States for the District of New Mexico.

Mr. Summers Burkhart, United States Attorney, filed a brief for the appellant.

Mr. Frank W. Clancy, Attorney General of New Mexico, filed a brief for the appellee.

Before Hook, Smith, and Carland, Circuit Judges.

HOOK, *Circuit Judge*, delivered the opinion of the Court:

This is a suit by the United States to enjoin a threatened breach of trust by the Commissioner of Public Lands of the State of New Mexico in respect of the proceeds of lands granted and confirmed to

the State on its admission to statehood. Upon submission of the cause on petition and answer the trial court entered a decree for the defendant, and the Government appealed. The material facts are undisputed.

By the Enabling Act of June 20, 1910, (36 Stat. 557) Congress granted and confirmed to the new State then being organized large bodies of public lands aggregating about 3,000,000 acres, for nineteen different purposes, to each of which was allotted separately and severally a specified quantity. The lands were to be selected under the direction and subject to the approval of the Secretary of
20 the Interior from the surveyed, unreserved, unappropriated and non-mineral public lands of the United States within the limits of the state. Lands actually or prospectively valuable for the development of water power or for hydro-electric use or transmission were reserved. Section 10 of the Act provides:

"That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory (of New Mexico), are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same. Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust."

The Act also subjected the donations to the following limitations and restrictions: No mortgages or other incumbrances shall be given to any person or for any purpose under any circumstances. The lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at public auction to be held at the county seat where the lands to be affected, or the major portion, lie. Notice of the auction of a prescribed character must be given in a manner and for a length of time specified. Minimum prices varying according to locations are prescribed. Separate funds are to be established for each of the several objects for which the grants and confirmations are made and, the Act goes on,

"whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in another, or for any object other than that for which the land producing the same was granted or confirmed."

The moneys are to be invested in safe interest bearing securities to be approved by the governor and the secretary of state who
21 are to be bound for the faithful performance of their duties. "Every sale, lease, conveyance, or contract of or concerning

any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding." The Act further provides that:

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

Provision was also made for the acceptance of the Act and the terms and conditions of the grant and confirmation, irrevocable without the consent of the United States and the people of the State.

The State accepted the grant and confirmation of the lands upon the conditions and limitations prescribed (secs. 9 and 10, Art. 21, Constitution of New Mexico). Afterwards, on March 8, 1915, the legislature of the State passed an act over the veto of the governor entitled: "An Act concerning the publicity and promotion of public resources and welfare." It authorized the Commissioner of Public Lands to expend annually three cents on the dollar of the annual income from sales and leases of lands "for making known the resources and advantages of this state generally, and particularly to homeseekers and investors." The defendant Commissioner intends to exercise the authority so conferred and to devote a part of the avails of the lands granted and confirmed by Congress to the purposes mentioned.

We think it is clear that the contemplated use of the funds would be a breach of trust. Words more clearly designed than those of the Act of Congress to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen. Each quantity of land with its proceeds was to be devoted to a particular object to the exclusion of all others. The Act required "separate funds" and provided that "no moneys shall ever be taken from one fund for deposit in any other or for any object other than that for which the land producing the
22 same was granted or confirmed." If there had been a single donation in trust for one of the purposes specified, as, for example, "a miners' hospital for disabled miners," it could not reasonably be contended that the trust funds could properly be expended in advertising the agricultural resources of the state or to promote the general welfare. The aggregate of the lands granted and confirmed in trust comprised but about one twenty-sixth of the area of the state, all of which, together with the mass of other property privately owned and subject to taxation, was interested in the exploitation of the resources of the state and the attraction of homeseekers and investors. That there were a number of trust donations for separately defined purposes does not alter the situation. The idea of hotchpotch and a ratable contribution to a common object such as characterizes the proposed use was expressly negatived. While of course all of the trust purposes have relation to the general public good and would profit thereby, yet severally regarded, as was manifestly the intention,

each is of a more definite and limited character. Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people, or that the proceeds should constitute a fund like moneys raised by taxation for "general purposes." Nevertheless, the state legislative act in question proceeds upon such a theory. The limitations upon the powers over the expenditures of these trust funds are in some respects like those not infrequently found in state constitutions that taxes shall not be levied except for expressed purposes to which alone they shall be devoted when collected. It would go without saying that taxes levied and collected "for the payment of the bonds and accrued interest thereon issued by Grant and Santa Fe Counties, New Mexico" (one of the trust purposes here), could not under such restrictions be lawfully expended "for making known the resources and advantages of this state generally." The ordinary result of such publicity would be at the best a general good to the state, its inhabitants, their property and enterprises, in which the various trust purposes would not be interested in proportion to the value or amount of their respective estates. To some it would be difficult to trace more than an indirect advantage, an advantage too remote to justify the expenditure of trust funds guarded by such limitations as were here imposed and accepted. Some of the purposes designated in the Act of Congress are: an asylum for the insane; an asylum for the deaf and dumb; a
23 reform school; an institution for the blind; and the enlargement and maintenance of the territorial penitentiary. To each of these, as to the others, was given a specified quantity of land for its exclusive use and benefit with conditions in detail as to the method of sale and the keeping of separate funds and accounts without borrowing or lending between them. It is said that an advertisement of the entire state would benefit every portion of it, and that the attraction of homeseekers and investors would make for a wider and better market for the trust lands. But Congress made definite provisions specifying the character and extent of the notices of the sales. If additional advertisements of the state at large and its resources are deemed advisable the cost should come from available public funds, not from those of the trusts. The proposed campaign of publicity is for the general advancement of the state. It has no immediate or direct bearing upon the trust lands or purposes except as they are within and pertain to the state at large. For aught that appears the lands may or may not be offered for sale at the time. The advantage accruing is too indirectly consequential to authorize the use of the trust funds. It would be but a step further to argue the advantage that would accrue to the trusts from the physical construction of some of the attractive resources of the state that are to be advertised, such as systems of public highways, irrigation, public schools and the like.

The decree is reversed and the cause is remanded with direction to enter a decree for the plaintiff.

Filed October 29, 1917.

24 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1917.

MONDAY, October 29, 1917.

No. 4673.

UNITED STATES OF AMERICA, Appellant,

vs.

ROBERT P. ERVIEN, Commissioner of Public Lands of the State of New Mexico.

Appeal from the District Court of the United States for the District of New Mexico.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of New Mexico, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to enter a decree for the plaintiff.

October 29, 1917.

25 (*Petition for and Order Allowing Appeal to Supreme Court, U. S.*)

To the Honorable the said Circuit Court of Appeals or any Justice thereof:

Now comes Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, and being aggrieved by the judgment of the said Honorable Court, prays an appeal therefrom to the Supreme Court of the United States, without supersedeas of the said judgment and respectfully asks that the amount of cost bond may be fixed.

HARRY L. PATTON,
Attorney General of the State of New Mexico.

A. B. RENEHAN,
Of Santa Fe, N. M., of Counsel.

The foregoing cause having come on to be heard this 28th day of January, 1918, upon the application of the appellant, Robert P.

Ervien, Commissioner of Public Lands of the State of New Mexico, for an appeal to the Supreme Court of the United States, and fixing the amount of cost bond, without supersedeas:

It is ordered that said application be and the same hereby is granted, upon condition that appellant file a bond for costs within fifteen days from this date.

It is further ordered that bond for costs on such appeal is hereby fixed in the sum of One thousand Dollars ($1,000.00).

WILLIAM C. HOOK,
U. S. Circuit Judge, Eighth Circuit.

Service of copy of the foregoing motion for an appeal is
26 this 25th day of January, 1918, acknowledged, and the issuance and service of citation on the appeal aforesaid is hereby waived.

S. BURKHART,
United States District Attorney for the District of New Mexico.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 28, 1918.

(*Assignment of Errors on Appeal to Supreme Court, U. S.*)

Now comes the appellant, Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, by Harry L. Patton, Attorney General of the State of New Mexico, his attorney, and A. B. Renehan, of Santa Fe, New Mexico, of counsel, and assigns error on appeal of the said cause to the Supreme Court of the United States as follows:

1. The court erred in reversing the judgment of the District Court and remanding said cause with instructions that judgment be entered for the plaintiff, United States of America.

2. The court erred in holding that the Act of the Legislature of the State of New Mexico, of March 8, 1915, entitled "An Act concerning the Publicity and Promotion of Public Resources and Welfare," operated and operates in contravention of the Enabling Act of June 20, 1910, (36 Stats., 557) for the admission of New Mexico into the union of states, and as a breach of the restrictions thereof and trusts thereby created, for the following reasons:

(*a*) That without said act of the said State Legislature,
27 the expenditure of moneys from the trust funds was permissible in the proper, business-like administration of the said land grants and the trusts in respect thereto laid, and the said Act of the Legislature was a limitation upon the amount of money which might be used in the administration of the said lands and trusts.

(*b*) That, while the said Act of the State Legislature, concerned the making known of the resources and advantages of the State of New Mexico generally, it was particularly limited to the making

known of such resources and advantages "to homeseekers and investors," being the classes of persons to which the State of New Mexico would naturally offer its granted lands, the offering of which, under circumstances of widest publicity, was the duty and particular business of the appellant as representative, through the Legislature, of the State of New Mexico.

(*c*) That it is apparent upon the face of the said Act that the publicity and promotion of the State's resources and advantages was merely incidental to the primary purpose and procuring the sale or lease of the State's granted lands to the class of persons who would obviously be interested therein, to-wit, homeseekers and investors.

(*d*) That close restriction upon the advertisement and making known of the State's possession of lands for sale and lease and the resources and advantages of New Mexico as a state within which to acquire lands of the State by purchase or lease, incidental to the fomenting of interest in State lands proper, would be unbusinesslike, result in great damage to the State and its trust funds under the Act of Congress, and run counter to the spirit and underlying purpose of the said Act of Congress, which was and is to produce the greatest possible amount of money rather than the least permissible amount of money, and to develop the said State in population, productiveness and general wealth.

28 (*e*) That the lands affected by the said Act of the Legislature were intended to be sold or leased for the greatest purchase price or rental, which result could not be accomplished by narrow publicity, but could be best achieved by provocative measures similar to those used by private dealers in and promoters of lands and leases.

3. The District Court and the Circuit Court of Appeals erred in entertaining jurisdiction of the said cause because in effect it is a suit against the State of New Mexico.

Wherefore, he prays that the judgment of the said Circuit Court may be reversed and remanded with instructions to reinstate the judgment of the District Court, and that the judgment of the said District Court be affirmed.

HARRY L. PATTON,
Attorney General of the State of New Mexico,
Santa Fe, N. M., Attorney for Appellant.

A. B. RENEHAN,
Santa Fe, N. M., of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 28, 1918.

(Affidavit as to Amount Involved.)

STATE OF NEW MEXICO,
County of Santa Fe:

Robert P. Ervien, being first duly sworn, upon his oath says:

29 1. That he is Commissioner of Public Lands of the State of New Mexico, and the appellant named in the entitlement of this cause.

2. That he has held his present office since the 6th day of January, 1912.

3. That the amount involved in this litigation exceeds $12,000 in each year, and exceeds $1,000.00 every month.

4. That at all times at and since the commencement of the said cause in the United States Court there has been in his hands more than $1,000.00 for the publicity and promotion of the resources and advantages of New Mexico under the Act of the Legislature of the said State of March 8, 1915, and at the present time there is in his hands for such purpose more than $1,000.00, and at the time when the opinion and the judgment of the United States Circuit Court of Appeals was rendered and handed down there was in his hands for the purposes aforesaid more than $1,000.00.

ROBERT P. ERVIEN.

Subscribed and sworn to before me this 25th day of January, 1918.

[SEAL.] STELLA V. CANNY,
Notary Public.

My commission expires April 9, 1921.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 28, 1918.

Bond on Appeal to Supreme Court, U. S.

Know all men by these presents, that we, Robert P. Ervien,
30 Commissioner of Public Lands of the State of New Mexico, of Santa Fe, New Mexico, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, duly empowered to become surety on bonds such as this bond, as surety, are held and firmly bound unto the United States of America in the sum of One Thousand Dollars ($1,000.00), lawful money of the United States, to be paid to the said The United States of America, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators and successors by these presents.

Sealed with our seals and dated this 5th day of February, 1918.

Whereas, the said Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, has sued out an appeal from the United States Circuit Court of Appeals of the Eighth Circuit to the Supreme Court of the United States to reverse the judgment and decree of the

said United States Circuit Court of Appeals of the Eighth Circuit, in the suit of "The United States of America against Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, which said suit was and is entitled in the said United States Circuit Court of Appeals of the Eighth Circuit "United States of America, appellant, vs. Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, appellee, No. 4673."

Now, therefore, the condition of this obligation is such that if the above named Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, as appellant, in the said United States Supreme Court shall prosecute his said appeal to effect and answer all costs if he fail to make good his said plea and appeal, then this obligation shall be void; otherwise to remain in full force and effect.

ROBT. P. ERVIEN,
Principal;

31 UNITED STATES FIDELITY & GUARANTY CO.,
Surety,

[SEAL.] By C. A. BISHOP,
Its Attorney in Fact.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On the 5th day of February, 1918, before me personally appeared Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, as principal, to me known to be the persons described in and who duly acknowledged the foregoing instrument as principal thereto, and acknowledged that he executed the same as his free act and deed for the purposes therein set forth.

In witness whereof, I have hereunto set my hand and notarial seal the day and year in this certificate written.

[SEAL.] STELLA V. CANNY,
Notary Public.

My commission expires April 9, 1921.

Approved:
WILLIAM C. HOOK,
U. S. Circuit Judge, Eighth Circuit.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 5th day of February, 1918, before me personally came C. A. Bishop, known to me to be the attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation de-
32 scribed in and which executed the within and foregoing bond of R. P. Ervien as a surety thereon, and who being by me duly sworn, deposes and says, that he resides in the City of Santa Fe, State of New Mexico; that he is the attorney-in-fact of said

Company and knows the corporate seal thereof; that the said United States Fidelity and Guaranty Company is duly and legally incorporated under the laws of the State of Maryland; that the seal affixed to the within bond is the corporate seal of said Company and was thereby affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that the signatures of said C. A. Bishop subscribed to said bond is the genuine handwriting of C. A. Bishop and was thereto subscribed by order and authority of said Board of Directors; and that the assets of said Company, unencumbered and liable to execution exceed its claims, debts and liabilities of every nature by more than the sum of One Million Dollars; that the United States Fidelity and Guaranty Company has complied with all the laws of the State of New Mexico relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed.

C. A. BISHOP,
Deponent's Signature.

Sworn to and acknowledged to before me, and subscribed in my presence this 5th day of February, 1918.

[SEAL.] IDA C. KRICK,
Notary Public.

My commission expires January 9th, 1922.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 8, 1918.

33 In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

United States of America to the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C., within sixty days after the date of this citation pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals, for the Eighth Circuit, in a cause wherein Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, is appellant, and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William C. Hook, United States Circuit Judge in and for the Eighth Circuit, this 28th day of January, A. D. 1918.

WILLIAM C. HOOK,
United States Circuit Judge, Eighth Circuit.

UNITED STATES OF AMERICA,
Department of Justice:

Due service of the foregoing citation upon the appellee, United States of America, this 7th day of March, 1918, is hereby acknowledged.

JNO. W. DAVIS,
Solicitor-General.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1917. No. 4673. Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, Appellant, vs. United States of America. Citation on Appeal to Supreme Court, U. S. Filed Mar. 11, 1918. E. E. Koch, clerk.

34 (*Præcipe for Transcript on Appeal to Supreme Court U. S.*)

To the Clerk of the said Court, St. Louis, Mo.:

DEAR SIR: Please prepare a record on appeal in the aforesaid cause to the Supreme Court of the United States, containing the following items:

1. The entire record on appeal from the United States District Court for New Mexico to the United States Circuit Court of Appeals of the Eighth Circuit.
2. The judgment of the United States Circuit Court of Appeals.
3. The opinion of the said Court.
4. The motion for appeal and the order allowing the same.
5. The appeal bond.
6. The citation and acknowledgment of service.
7. This præcipe and the acknowledgment of service thereof.
8. Statement of costs.

A. B. RENEHAN,
Attorney for Appellee in This Court,
Santa Fe, N. M.

Service of a copy of this præcipe is acknowledged this 19th day of February, 1918, and inasmuch as the entire record in the United States Circuit Court of Appeals is required by the said præ-
35 cipe, the provision of Rule 8 for the appellee to ask additional portions of the record within ten days after such service, is hereby waived.

S. BURKHART,
U. S. District Attorney for the District of New Mexico,
By J. O. SETH,
Assistant U. S. District Attorney.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 23, 1918.

36 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of New Mexico, as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of Counsel for Appellee, in a certain cause in said Circuit Court of Appeals wherein the United States of America was Appellant, and Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, was Appellee, No. 4673, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-ninth day of December, A. D. 1917, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for District of New Mexico.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twelfth day of March, A. D. 1918.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: File No. 26,401. U. S. Circuit Court Appeals, 8th Circuit. Term No. 934. Robert P. Ervien, Commissioner of Public Lands of the State of New Mexico, Appellant, vs. The United States of America. Filed March 25th, 1918. File No. 26,401.

The Supreme Court, U. S.
FILED
APR 30 1912
JAMES D. MAHER,
Clerk.

In The Supreme Court of The United States

OCTOBER TERM, 1912

ROBERT P. ERVIEN, *Commissioner of the Public Lands of the State of New Mexico, Appellant,*

vs.

THE UNITED STATES OF AMERICA

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit

BRIEF OF APPELLANT

In support of the contentions: (1) That the District Court had no jurisdiction in this suit, and (2) That the appeal, first of a reasonable interest of the matter derived from the sale of State lands, for purposes expressly named, and the benefit of the trust under which such lands were granted by the United States to the State of New Mexico.

A. B. RENEHAN,
Attorney for Appellant.

OAKLEY H. COLEMAN,
Of Counsel for Appellant.

Press of Byron S. Adams, Washington, D. C.

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No. 934

In The Supreme Court of The United States

ROBERT P. ERVIEN, *Commissioner of the Public Lands of the State of New Mexico, Appellant,*

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

The Act of Congress admitting the Territory of New Mexico into the Union as a state provided, among other things, that large portions of the public domain situated in various localities throughout that Territory should be granted to the State of New Mexico in trust for the purpose of leasing and selling those lands and paying the proceeds to certain named beneficiaries.

> "That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory (of New Mexico) are hereby expressly transferred and confirmed to the said state, shall be

by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided, and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of the said lands shall be subject to the same trusts as the lands producing the same."

"The disposition of any of said lands or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

(Complaint Par V. Tr. page 3.)

This trust was accepted by the State of New Mexico.

"This state and its people consent to all and singular the provisions of the said act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act

> granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided." (Sec. 9, Art. XXI, Const. of New Mexico.)

No provision was made by the terms of the trust for the payment of any of the expenses incident to its administration.

On March 8, 1915, the State of New Mexico, passed an act, Section 1 of which reads as follows:

> "It shall be unlawful for the Commissioner of Public Lands to expend for making known the resources and advantages of this state generally and particularly to homeseekers and investors, more than three cents on the dollar of the annual income of his office from sales and leases of lands, but, up to such limit of money annually, he may give or cause to be given publicity to such resources and advantages, and do or cause to be done all incidental work, in his judgment advisable to be done." (Tr. page 6.)

The appellant, as Commissioner of the Public Lands of the State of New Mexico, is the officer through whom that state administers the trust in question and handles the distribution of the funds derived from the leases and sale of the trust property.

This suit was brought for the purpose of enjoining the appellant from using any of the funds in his hands as such Commissioner for the purposes authorized by the Act of the State of New Mexico quoted above.

Appellant's answer admitted the facts set forth above and denied "that he threatens or has threatened that he will expend three cents on the dollar of the annual income of his office derived from sales and leases of land to give publicity to the resources and advantages of the State generally, but he states the fact to be that when it shall seem expedient and desirable so to do he may expend money for the purpose of giving publicity to the resources and advantages of the State generally, and particularly to homeseekers and investors, but not necessarily to the full limit of three cents on the dollar of the annual income of his office derived from sales and leases of land, but so much thereof as may seem proper and desirable." (Paragraph 3 of answer, Tr. p. 8.)

The case was submitted on the pleadings and a decree rendered by the District Court denying the injunction, which decree was reversed by the Circuit Court of Appeals.

The appellant contends:

1. That the District Court was without jurisdiction in the case for the reason that this was in effect a suit between the United States and the State of New Mexico.

2. That the expenditure of the funds in question by the appellant in the manner set up in his answer would not be a breach of trust.

In order to present these contentions to this court, the following assignments of error have been filed:

ASSIGNMENTS OF ERROR.

Now comes the appellant, Robert P. Ervien, Commissioner of Public Lands of the State of New Mex-

ico, by Harry L. Patton, Attorney General of the State of New Mexico, his attorney, and A. B. Renehan, of Santa Fe, New Mexico, of counsel, and assigns error on appeal of the said cause to the Supreme Court of the United States as follows:

1. The court erred in reversing the judgment of the District Court and remanding said cause with instructions that judgment be entered for the plaintiff, United States of America.

2. The court erred in holding that the act of the Legislature of the State of New Mexico, of March 8, 1915, entitled "An Act Concerning the Publicity and Promotion of Public Resources and Welfare," operated and operates in contravention of the Enabling Act of June 20, 1910, (36 Stats., 557) for the admission of New Mexico into the union of states, and as a breach of the restrictions thereof and trusts thereby created, for the following reasons:

(a) That without said act of the said State Legislature, the expenditure of moneys from the trust funds was permissible in the proper, businesslike administration of the said land grants and the trusts in respect thereto laid, and the said Act of the Legislature was a limitation upon the amount of money which might be used in the administration of the said lands and trusts.

(b) That, while the said Act of the State Legislature, concerned the making known of the resources and advantages of the State of New Mexico generally, it was particularly limited to the making known of such resources and advantages "to homeseekers and investors," being the classes of persons to which the State of New Mexico would naturally offer its granted lands, the offering of which, under circumstances of widest

publicity, was the duty and particular business of the appellant as representative, through the Legislature, of the State of New Mexico.

(c) That it is apparent upon the face of the said Act that the publicity and promotion of the State's resources and advantages was merely incidental to the primary purpose of procuring the sale or lease of the State's granted lands to the class of persons who would obviously be interested therein, to-wit, home-seekers and investors.

(d) That close restriction upon the advertisement and making known of the State's possession of lands for sale and lease and the resources and advantages of New Mexico as a state within which to acquire lands of the State by purchase or lease, incidental to the fomenting of interest in State lands proper, would be unbusinesslike, result in great damage to the State and its trust funds under the Act of Congress and run counter to the spirit and underlying purpose of the said Act of Congress, which was and is to produce the greatest possible amount of money rather than the least permissible amount of money, and to develop the said State in population, productiveness and general wealth.

(e) That the lands affected by the said Act of the Legislature were intended to be sold or leased for the greatest purchase price or rental, which result could not be accomplished by narrow publicity, but could be best achieved by provocative measures similar to those used by private dealers in and promoters of lands and leases.

3. The District Court and the Circuit Court of Appeals erred in entertaining jurisdiction of the said

cause because in effect it is a suit against the State of New Mexico.

WHEREFORE, he prays that the judgment of the said Circuit Court may be reversed and remanded with instructions to reinstate the judgment of the District Court, and that the judgment of the said District Court be affirmed.

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION IN THIS CASE.

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and citizens of other states, or aliens, in which latter cases it shall have original but not exclusive jurisdiction." (Act. of March 3, 1911, ch. 231, Sec. 238.)

There is no question but that the present suit did not fall within either of the classes named in which the jurisdiction of the Supreme Court is not exclusive, and the only question regarding this phase of the case is, therefore, whether or not the State of New Mexico was a party to this suit within the meaning of the statutory provision referred to.

It is not contended that the appellant, as Commissioner of Public Lands of the State of New Mexico, had any personal interest in the present controversy. His office merely vested him with the power to collect certain moneys on behalf of the State of New Mexico and deliver the same to the Treasurer of the State.

> "Said Commissioner shall have power * * * to receive all moneys due the State derived from any state lands and credit said moneys so received to the separate funds created for the respective purposes named in grants by Congress or otherwise, and he shall pay over to the State treasurer, on or before the 10th day of the next succeeding month, all such moneys received during each month, to be credited to the several funds respectively entitled thereto." (Act of June 14, 1912, Legislature of New Mexico.)

Appellant submits that under these circumstances the controversy in this case was solely between the United States and the State of New Mexico; that the sole object of the suit was to prevent the State of New Mexico, through its officers, from committing an alleged breach of trust in the administration of the trust estate over which the State of New Mexico—and not the nominal defendant—was trustee. If it were established that the acts contemplated by the defendant would have constituted a breach of the trust agreement between the United States and the State of New Mexico, still the ultimate purpose of the suit was clearly to enjoin the State of New Mexico from breaking that contract, and it is submitted that the State of New Mexico was as clearly interested in the litigation when this was attempted through attack on the officer of the State who administered the land as if the injunction had been prayed for against the State itself.

The following decisions of this court on the analagous question of when the state is a party to a suit within the contemplation of the 11th amendment to

the constitution of the United States are submitted as conclusive of this question:

> "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power." (Louisiana vs. Jumel, 107 U. S. 711, at 727.)

"But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the XIth amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State.'" (Hagood vs. Southern, 117 U. S. 52, p. 67.)

"The relief sought was a judgment against the defendant 'as treasurer of the State of California,' for the sum of $2,272.80 with interest

thereon from the date of the payment of that sum or any portion thereof to the state treasurer, together with the costs of the action. * * We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a state, this suit, though in form against an officer of the state, is against the state itself. Re Ayers, 123 U. S. 443; 31 L. Ed. 216, 8 Sup, St. Rep. 164; Pennoyer vs. McConnaughy, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Supt. Ct. Rep. 699." (Smith vs. Reeves 178 U. S. 436, at 439.)

"In Hagood vs. Southern, 117 U. S. 52, it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the court was without jurisdiction, because it was a suit against a State.

"The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through

whom alone it can act in doing or refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the Circuit Court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs." (In re Ayers, 123 U. S. 443, at p. 502.)

"Conceding this to be true, the objection still remains that this is virtually a suit against the state. The auditor is sued in his official capacity, and it is sought to compel him to act in that capacity in order to raise the tax in question, contrary to subsequent legislation and the present laws of the state. The case is clearly within the principle of the decisions in Louisiana vs. Jumel, 107 U. S. 711; Cunningham vs. Macon & Brunswick Railroad Company, 109 U. S. 446; Hagood vs. Southern, 117 U. S. 52; In re Ayers, 123 U. S. 443; and North Carolina vs. Temple, just decided ante, 22." (New York Guaranty Co. vs. Steele, 134 U. S. 230 at 232.)

To the same effect are the cases of Governor of Georgia vs. Madrazo, 26 U. S. 110; Cunningham vs. Macon & Brunswick R. R. Co. 109 U. S. 446; Antoni vs. Greenhow, 107 U. S. 769.

The analogy on this point between cases arising under the XIth amendment and cases such as this was recognized by this Court in the case of the State of Minnesota vs. Hitchcock, 185 U. S. 373.

II

THE EXPENDITURES PROPOSED BY APPELLANT WOULD NOT CONSTITUTE A BREACH OF TRUST.

The appellant contends in this connection that the proposed expenditures would not constitute in any manner a distribution of the proceeds of the trust, but, on the other hand, would constitute an item of expense in the administration of the trust estate: that such expenditures would result in an increased demand for the lands in question and would thus increase rather than diminish the proceeds to be distributed to the beneficiaries. The fact that certain institutions were named in the declaration of trust as the sole beneficiaries of the proceeds thereof can, therefore, have no bearing on this case.

No provision was made in the trust agreement for the payment of expenses incident to its proper administration. It is therefore essential to the decision of this phase of the case for the court to decide, first, whether or not a trust estate is chargeable with the reasonably necessary expenses of its administration in cases where the declaration of trust is silent on that question; and, second, if the trust estate is so chargeable whether or not the proposed expenditures were so palpably unreasonable as to warrant their prohibition by the courts.

Mr. Perry, in his works on trusts, answers the first question as follows:

> "Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no

> provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty." (Perry on Trusts, Sec. 910.)

This doctrine was expressly affirmed by this Court in the case of Trustees vs. Greenough, 105 U. S. 527, in which the court said:

> "It is a general principle that a trust estate must bear the expenses of its administration."

and, after citing numerous authorities, concluded:

> "The subject of allowances to be made to trustees *eo nomine* is very fully examined in the books. An exhaustive citation of both English and American authorities is to be found in the notes to the case of Robinson v. Pett, 2 White & Tudor's Leading Cases in Equity, 238, American edition, pp. 512-600; and see Perry on Trusts, Secs. 894, 910, 912.
>
> "It is unnecessary, however, to pursue the subject further. The conclusion to which we have come is that, under the circumstances of this case, the Circuit Court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject since it has

> far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case by appellants that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made." (p. 537.)

The above decision was expressly approved in the later case of Middaugh vs. Wilson, 151 U. S. 333.

Lord Eldon says:

> "It is in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust." (Worrall vs. Harford. 8 Ves., 8.)

Lord Cottenham says:

> It is "quite clear, according to the rule, which applies to all cases of trust, that, if necessary expenses are incurred in the execution of the trust, or in the performance of duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet these expenses, out of the funds in their hands belonging to the trust." (Attorney General vs. Mayor of Norwich, 2 M. & Cr., 406, 424—40 Eng. Rep. Full Reprint, 702.)

Such is the rule of courts of equity, and such also is the rule at common law. (Rex vs. Inhabitants of Essex, 4 Tr., 591; Rex vs. Commissioners of Sewers, 1 B. & Adolph, 232.)

Money expended in effecting sales will be allowed the trustees. (Crump vs. Baker, 18 Ves., 285.)

In determining whether or not the contemplated expenditures were reasonable, the general purposes of the acts in question must be considered.

> "In all cases the propriety or impropriety of particular payments made or expenses incurred by a trustee will depend on the extent of his powers of management, the nature of the trust property, and the relative position of the *cestuis que trustent*; these and a variety of other circumstances, which vary in every case, will all be taken into consideration in determining the question; and it is extremely difficult to lay down any general rules upon this point." (Hill on Trustees, ch. 5, p. 570.)

Section 10 of the Enabling Act creates primarily a trust to sell or lease, and a secondary trust of the funds thus derived. There is permission to lease lands for periods not exceeding five years without specific advertisement.

The provision for sale or lease is as follows:

> "Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the countyseat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once a week for not less than ten successive weeks in a newspaper of general circulation published regularly at the countyseat, and in that newspaper of like circulation which shall then be

regularly published nearest to the location of such lands so offered."

This is very limited publicity and has only to do with the selling transaction itself, and relates in no sense to the exposition of the advantages of the lands to be sold. A bald announcement is required. The State statute, of which complaint is made, recognizes the common law or equitable principle that a trust should bear the expenses of its administration. But, further, recognizing that law and principle, it sets a boundary beyond which the State Land Commissioner shall not go, under that law and principle. It is a statute of restraint and limitation only.

It is the duty of trustees to sell to take all prudential measures, in keeping with good business, to get the best price.

There is no prohibition in the Enabling Act against enlarged notoriety. The manner of conducting the sale is prescribed, and the limitation thus established means no more than that the sale shall be by public auction rather than private, that there shall be at least the advertisement required by the act.

The predetermined disposition of the lands or the money derived therefrom means only that they, shall be devoted to the benefit of the institutions and purposes mentioned and shall not be diverted to other purposes, but thereby it was not intended that the trust should not bear the legitimate expenses of its furtherance, for the money derived from the lands is the sum remaining after defraying just costs of their sale.

It being permissible under the act to lease lands for a limited term without the particular advertisement expressed in the statute, it cannot rightly be said that the State might not create a favorable market for

leaseholds by such publicity as is authorized by House Bill No. 357. (R. p. 6.)

Every intendment should be in favor of the legitimacy of the act of a sovereign State.

> "Lands east of the line between ranges 18 and 19 east of the New Mexico principal meridian shall not be sold for less than $5.00 per acre, and lands west of said line shall not be sold for less than $3.00 per acre." (Par. 5, Sec. 10, Enabling Act.)

The 18th Annual Report of the Commissioner of Public Lands of New Mexico for the fifth fiscal year, ended November 30, 1917, covering the time from February 7, 1917, to October 16, 1917, page 52, shows the average price obtained for $3.00 land to have been $3.19, and the average price obtained for $5.00 land to have been $7.43½.

The third paragraph from the last of Section 10 of the Enabling Act declares void

> "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby created or confirmed, or the use thereof, or the actual products thereof, not made in substantial conformity with the provisions of this act."

It thus appears that strict conformity is not demanded, but there is a leeway in which the State, through its Land Commissioner, may move. That provision liberalizes the whole act. It does not forbid businesslike promotion.

It is respectfully asserted that the establishment of separate funds for each of the several objects for which the grants of land were made or confirmed does not furnish, as the Circuit Court of Appeals thinks, any support for that court's argument, for the fund

consists of that money which it is entitled to receive after the deduction of the proper expenses of administration, nor is there any aid to interpretation to be found in the provision with reference to the deposit of moneys derived from such lands. Likewise of no use is the prohibition against taking money from one fund for deposit in another, or for any other object than that for which the land producing the same was granted or confirmed, since these provisions affect only the amount of money derived from sales or leases, after the deduction of rightful expenses or they relate to the management of the fund after it comes into existence. It would seem that the Circuit Court of Appeals has given an erroneous effect to the statute as a whole and in its several elements. If the State statute had authorized extravagances, there would doubtless be breach of the trust, but that statute is itself a prohibition as well as a permission.

That part of the Enabling Act in which we are interested, Section 10, has for its object the production of money to make funds for educational and other objects stated in Section 7, by sales and leases, but it also has in mind the aggrandizement and enrichment of the new State. Aggrandizement and enrichment must come through homeseekers or settlers and investors. It was not to be supposed, and it was not in the contemplation of Congress, that the State would pause in its advancement or come to an impasse, or that the comparatively few people who constitute its population would be able to absorb the large quantities of land donated. An influx of new population and new wealth was requisite to growth and development.

A too narrow view has been taken of the publicity act. Its particular purpose rather than its general ob-

ject should control, and the legislature made that law to advertise "the resources and advantages of this State * * * particularly to homeseekers and investors." For what purpose was this done? To attract homeseekers, settlers, new citizens, to people the plains and valleys, and investors, men of means, cattle raisers, sheep growers, irrigation enterprises, lumbermen, mining prospectors and operators, to create wealth out of the grasses, the trees, the waters and the minerals of the new sovereignty. These were the specific objects of the New Mexico enactment. The general advertisement of the State was purely incidental. Both classes of notoriety, the general and the particular, tended to make more bidders, more competition and more buyers at every sale of land or leasehold. They meant — "Come and see what we have throughout the State; look at all our wares, and buy some of them."

From the earliest days, in the administration of trusts to sell, publicity through the trustee was required. It was one of his obligations. From the earliest days, the costs accruing from these causes were held proper and allowed.

Under trusts to sell, or powers of sale, with regard to the mode in which the trustee should proceed to sell the estate, it has been laid down by Lord Eldon (Downes vs. Grazebrook, 3 Mer., 208),

> "That a trustee for sale is bound to bring the estate to the hammer under every possible advantage to his *cestuis que trustent.*"

Therefore, he will not be justified in damping the sale by unnecessary restrictions in the condition of sale. (Wilkins vs. Fry, 1 Mer., 268; 2 Rose, 375.) So the trustee should use all reasonable diligence to ob-

tain the best price. (Ord vs. Noel, 5 Madd., 440; Mortlock vs. Buller, 10 Ves., 309.) And for this purpose it will be proper for them to have the estate previously valued. (Mortlock vs. Buller, 10 Ves., 309; Connolly vs. Parsons, 3 Ves., 628.) Contract for sale must not be entered into under circumstances of haste or improvidence. (Ord vs. Noel, 5 Madd., 440.)

Yet the ruling by the Circuit Court of Appeals invites such haste or improvidence. It means that a better price was not to be sought by extension of publicity.

The beneficiaries of this trust are the people. The entity called the State is the trustee acting in this business through its agent, its Commissioner of Public Lands.

In the light of these authorities it is submitted as the unquestioned doctrine that this trust estate was chargeable with the reasonable and necessary expenses of its administration, and that, as stated in the case of Trustees vs. Greenough, in determining what expenses are reasonable, "The court below should have considerable latitude of discretion * * * since it has far better means of knowing what is just and reasonable than an appellate court can have."

It was neither alleged in the complaint nor urged in the trial court that the percentage of the funds which the defendant was authorized to expend in this case was excessive. The only question was as to whether or not the expenditures would be improper because of the fact that they were not limited to advertising the precise lands which were to be sold, but might be used for making known the resources of the State generally to homeseekers and investors.

The District Court, in determining this question,

took judicial notice of the fact that the lands which were held in trust were scattered throughout the entire State, so that it would be impossible to advertise any portion of the state without advertising a portion of the lands, and conversely, that it would be impossible to advertise in a general or effective way the lands held in trust without advertising the advantages and resources of the entire State.

Under these circumstances, it would seem at least a reasonable assumption that the individual business man would consider such expenditures to be sound business policy, and trustees to sell are empowered to proceed according to good business:

> "If a trustee acts as prudently for a trust as he would have done for himself and according to the usage of business * * * he is not answearable." (Phelps vs. Harris, 101 U. S. 859.)
>
> "Trustees for sale are bound by their office to sell the estate under every possible advantage for the beneficiaries * * * If the trustees or their agents fail in reasonable diligence in relation to the sale, * * * they will be personally responsible to the injured party for the loss." (2 Perry on Trusts, Sec. 770, p. 1277.)

The District Court, which was familiar with the conditions surrounding the administration of this trust, was apparently of that opinion:

> "Under such circumstances what would an individual owning such an estate and who wished to sell or lease it be allowed to do? He would, in the exercise of a sound business judgment, be allowed at the very outset to make its re-

sources known. Newspaper articles would be published; pamphlets and other literature for distribution would be prepared, and the dissemination of these would be entered upon. If this would be the course properly pursued by an individual controlling such an estate, it would seem that the same privilege should be accorded the state controlling and disposing of land for its institutions. The fact that by Chapter 60 the publicity is not confined to the specific lands being at the moment advertised for lease or sale does not impress me as material. An advertisement of the entire state and of its resources benefits every portion thereof. As is well known, these lands selected under the Enabling act, are located in every portion of New Mexico. Therefore, literature descriptive of the state tends to aid in each instance towards the sale of some portion of these holdings. It is not disputed that an inquiry as to a particular section of land may be answered by a typewritten letter and the cost of the office force which prepares, writes out, and mails the letter may be charged to the administration of this great estate. If this may be done through the typewriter, why may it not be done through the printing press? Why may not the letter be answered by a pamphlet instead of by a typewritten letter? And why may not this pamphlet describe either the particular locality, the particular county, or the state at large? The resources of each of these subdivisions enters into the value of any tract under consideration. If a private owner would do business

> in this way, and if in so doing business we would say that he is acting wisely, why may not the state pursue the same course. I am of opinion that it may." (Tr. pp. 10, 11.)

It is submitted in conclusion that where, as here, the question is solely one of whether or not the trustee is efficiently discharging his duties, the administration of the trust should not be interfered with by injunction unless a gross abuse of discretion be shown. (Nichols vs. Eaton, 91 U. S. 716; Colton vs. Colton, 127 U. S. 300.)

All of which is respectively submitted.

A. B. RENEHAN,
Attorney for Appellant.

CARL H. GILBERT,
Of Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ROBERT P. ERVIEN, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, appellant,
v.
THE UNITED STATES OF AMERICA. } No. 72.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit by the United States to enjoin Robert P. Ervien, as commissioner of public lands for the State of New Mexico, appellant herein, from expending any of the funds derived from the sale and lease of lands granted and confirmed by the enabling act of Congress of June 20, 1910 (36 Stat. L. 563), to the State of New Mexico for the purposes set forth in the act of the New Mexico Legislature of March 8, 1915, being "An act concerning the publicity and promotion of public resources and welfare," or for any other purpose than that for which the lands were granted and confirmed to the State.

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(The case was heard on the bill of complaint (R. 1–5) and the answer (R. 7–9). The Circuit Court of Appeals pertinently states the case as follows (R. p. 18):

> * * * The material facts are undisputed. By the enabling act of June 20, 1910 (36 Stat. 557), Congress granted and confirmed to the new State then being organized large bodies of public lands aggregating about 3,000,000 acres, for nineteen different purposes, to each of which was allotted separately and severally a specified quantity. The lands were to be selected under the direction and subject to the approval of the Secretary of the Interior from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of the State. Lands actually or prospectively valuable for the development of water power or for hydro-electric use or transmission were reserved. Section 10 of the act provides:
>
> "That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory (of New Mexico), are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same. Disposition of any of

said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust."

The act also subjected the donations to the following limitations and restrictions: No mortgages or other incumbrances shall be given to any person or for any purpose under any circumstances. The lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at public auction to be held at the county seat where the lands to be affected, or the major portion, lie. Notice of the auction of a prescribed character must be given in a manner and for a length of time specified. Minimum prices varying according to locations are prescribed. Separate funds are to be established for each of the several objects for which the grants and confirmations are made and, the act goes on,

"whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the State treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed."

The moneys are to be invested in safe interest bearing securities to be approved by the governor and the secretary of State, who are to be bound for the faithful performance of their duties. "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act, shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding." The act further provides that:

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law and in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

Provision was also made for the acceptance of the act and the terms and conditions of the grant and confirmation, irrevocable without the consent of the United States and the people of the State.

The State accepted the grant and confirmation of the lands upon the conditions and limitations prescribed (secs. 9 and 10, Art. 21, constitution of New Mexico).

The act of the New Mexico Legislature is as follows (R. p. 6):

An act concerning the publicity and promotion of public resources and welfare.

SECTION 1. It shall be unlawful for the commissioner of public lands to expend for making known the resources and advantages of this State generally and particularly to homeseekers and investors more than three cents on the dollar of the annual income of his office from sales and leases of lands, but, up to such limit of money annually, he may give or cause to be given publicity to such resources and advantages, and do or cause to be done all incidental work in his judgment advisable to be done.

SEC. 2. It is necessary for the preservation of the public peace and safety of the inhabitants of this State that this act shall become effective without delay, and, therefore, it shall be in full force from and after its passage, by the required two-thirds majority, or failing such majority, at the time otherwise provided by the constitution.

The District Court denied the injunction and dismissed the bill (Opinion, R. 10, decree, R. 12). The Circuit Court of Appeals reversed the decree of the District Court and remanded the cause with direction to enter a decree for the plaintiff (Opinion, 246 Fed. 277, R. 17–20). An appeal, without supersedeas, brings the case before this court (R. 21).

THE QUESTIONS PRESENTED.

The appellant contends that (1) the District Court was without jurisdiction in the case, and (2) the expenditures proposed by the appellant would not

constitute a breach of trust (Brief of Appellant, p. 4). On the contrary, the appellee contends that—

I. The District Court had jurisdiction, and

II. The act of the Legislature of New Mexico providing for the expenditure for advertising the resources and advantages of the State, of three cents on the dollar of the annual income from sales and leases of lands granted and confirmed to the State, is in conflict with the constitution of New Mexico, and the enabling act, and is void, and such expenditures would constitute the breach of trust denounced in the enabling act.

ARGUMENT.

I.

The District Court had jurisdiction of the case.

The jurisdiction of the District Court was not questioned in the courts below, and in the light of the decision in *Ex parte Young*, 209 U. S. 123, and the numerous cases approving the principles therein enunciated, it is difficult to believe that the question of jurisdiction is seriously raised. The right to enjoin an officer of the State clothed with some duty in regard to the enforcement of an unconstitutional State law was elaborately considered, and all of the authorities relied upon by counsel for the appellant are clearly distinguished in *Ex parte Young*. The controversy therein, in its ultimate aspect, concerned the power of the Federal court to prevent the enforcement by the attorney general of Minnesota of railroad rates fixed under State legislative authority

which were confiscatory, *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 293, and the court, after pointing out (p. 149), that the case was one of an unconstitutional act of the State legislature and an intention on the part of the attorney general to enforce its provisions, re-affirmed, *Smyth* v. *Ames*, 169 U. S. 466, and speaking through Mr. Justice Peckham, said (p. 155):

> The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

The bill in this case is framed upon the theory that the act of the New Mexico Legislature is in contravention of Sections 9 and 10, Article 21 of the constitution of New Mexico, by which the grant and confirmation of the lands, upon the conditions and limitations prescribed in the enabling act, were accepted by the State, and also in conflict with the terms of the enabling act, and that the defendant as commissioner of public lands of New Mexico, a public officer of the State charged with the enforcement of its laws, is about to proceed wrongfully and in breach of the trust declared in the enabling act and in violation of the laws and rights of the United

States. Such a suit *can not* be regarded as one against the State. *Truax* v. *Raich*, 239 U. S. 33, 37; *Looney* v. *Crane*, 245 U. S. 178, 191; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456.

II.

The act of the Legislature of New Mexico is in conflict with the constitution of New Mexico and the enabling act, and is void, and the expenditures therein provided would constitute the breach of trust denounced in the enabling act.

In the enabling act Congress created definite, express, and independent trusts. Each specified quantity of land granted or confirmed was to be devoted to a particular object, and applying the proceeds from any particular land to any other object than that specified was expressly inhibited as a breach of trust. The Court of Appeals very aptly points out that the granted and confirmed lands aggregate only one twenty-sixth of the area of the State. Manifestly, the remaining twenty-five twenty-sixths of the State and all other public and private property therein are interested in the benefits to be derived from giving publicity to its resources and advantages. It is nowhere shown that any other provision of State law is made to give publicity to the resources and advantages of New Mexico, but the funds derived from these trust lands are made to bear the entire expense of any such publicity for the whole State as the commissioner of public lands of the State may determine is advantageous. This is so palpably a breach of trust as not to require argument.

If the Legislature of New Mexico can spend any part of the trust fund derived from the sale of these lands, not to advertise the particular lands but to give publicity to the whole resources and advantages of the State, it may well be argued that it can use any part of these funds it may see fit for the purpose of holding expositions and fairs, or other methods of advertising the resources of New Mexico. Indeed, if these funds can be at all diverted by the State legislature from the objects to which Congress devoted them, there is hardly any limit to which the legislature can not go in order to advertise the State's resources. Not only did Congress expressly inhibit the disposition of the funds derived from any particular tract of land for other purposes than to the specified object of the grant or confirmation, but it has expressly provided for the necessary advertisement for the sales and leases of the lands, and for the sales of timber thereon, in the following provision of section 10 of the enabling act (p. 563):

> * * * Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had,

> with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

This express provision for advertising the sale of these lands negatives the idea of the necessity for any other advertisement. If Congress had intended that the legislature of the State should devote any of these trust funds for the purpose of giving publicity to the resources and advantages of New Mexico, and at most, but indirectly, advertising these lands, it could easily have so provided.

Manifestly, Congress never intended that the trust funds derived from these lands should go into the State treasury and be devoted to the purpose of defraying such general expenses of the State as advertising its resources and advantages to home-

seekers. On the contrary, it expressly otherwise declared in section 10 of the enabling act as follows (p. 564):

> A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the State treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The State treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as defined by this act and the laws of the State not in conflict herewith.

The act of the State legislature in providing for the diversion of these trust moneys from the fund corresponding to the grant under which the particular land producing such moneys was conveyed or confirmed, and covering them into the general treasury of the State to be expended for

the general expenses of the State government, and not investing them in "safe interest-bearing securities," is plainly in conflict with the enabling act and is void, and constitutes a breach of trust.

CONCLUSION.

The decree of the Circuit Court of Appeals is right and should be affirmed.

Respectfully submitted.

FRANK K. NEBEKER,
Assistant Attorney General.

LESLIE C. GARNETT,
Attorney.

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